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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

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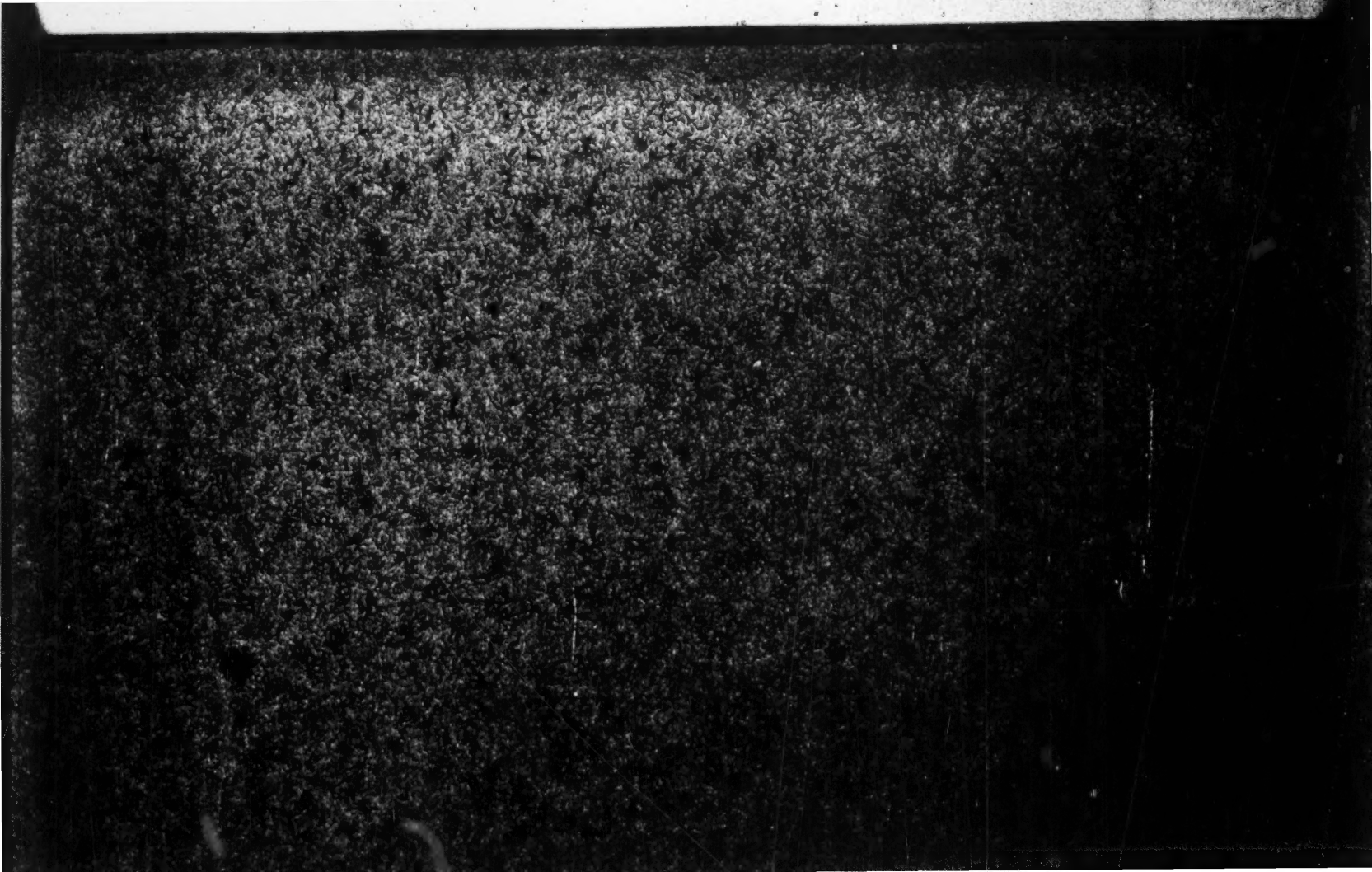

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(1) *The Erroneous Rulings as to Lack of Power of trial Judge or of Circuit Court of Appeals to grant additional time for settlement of the bill of exceptions or to modify the original order of extension.—Amendment of Specification of Errors.*

The conclusions announced by the Circuit Court of Appeals with respect to the lack of power of itself or of the trial judge to grant a further extension of time for the settlement of the bill in this case, or to modify the original order of extension, were distinctly made the subject of challenge in the petition for certiorari (pp. 20-23), and are considered in the Government's brief on the writ of certiorari (brf. 20-26). Concluding that the argument on these issues was

sufficiently developed in the petition, petitioner did not repeat it in his brief on the granting of the writ. To preclude the assumption that he has abandoned these points, petitioner now distinctly raises them again, and prays that the Specification of Errors in his brief (pp. 12-13) be regarded as amended to include:

> 6. The Circuit Court of Appeals erred in ruling that the trial judge was without power to grant an additional extension of time for the settlement and filing of the bill of exceptions; and in failing and refusing to rule to the contrary.
>
> 7. The Circuit Court of Appeals erred in ruling that it had no power to grant an additional extension of time for the settlement and filing of the bill of exceptions in this case, and no power to modify the trial judge's original extension orders; and in failing and refusing to rule to the contrary.

It is not thought that additional discussion of these points would be helpful, beyond what has been said in the petition and the Government's brief. In brief, the situation in respect of the first of these points (power to trial judge to grant additional extension within period of first extension but more than 30 days after taking of appeal) is that the decided weight of authority is with the ruling of the court below and supports the Government's argument. Nevertheless there is *obiter* (*Fierman* v. *U. S.*, 84 F. (2) 968—C. C. A. 3) in support of petitioner's view that an additional extension can be granted by the trial judge so long as it is entered within the period of the timely initial extension. Paragraph 1 of Rule IX *can* be read so as to support that view,—the argument being that, if this Court had intended that there should be only one extension, the Rule would have been drawn so as to say so in terms; and that, as the Rule *is* drawn, it negatives an intention to exclude more than one extension, since it provides that the trial judge

"shall give no extension of time that is not required in the interest of justice." Petitioner submits this question for consideration and decision. There is no force in the Government's suggestion (brf. 20-21) that the present record does not raise this question. While no order of additional extension appears in the skeleton record which has come here as a result of the Government's motion to docket and dismiss in the court below, that record does show that "on October 20, 1936, your petitioner applied to the trial judge for an order extending the time within which to settle and file the bill of exceptions and assignment of errors herein for a further period of thirty days. At the suggestion of Mr. Tompkins, the time was enlarged to two months and the trial judge stated that he would grant such extension" (R. 21). The Circuit Court of Appeals plainly had no doubt that this issue was raised on this record, for in its final opinion it notices the point and clearly adopts the majority view as to lack of power (R. 30).

On the second point (the power of the Circuit Court of Appeals to modify the extension order of the trial court, even after the 30 day period after taking appeal), the Government—although itself citing no case whatever upon the point—remarks that petitioner has no cases on the point either, whether before or after the adoption of the C. A. R. There were no cases before the C. A. R., since the point rests upon the existence of the C. A. R. As developed in the petition for certiorari, the argument in favor of the power is the scope and purpose of the Criminal Appeals Rules themselves, and particularly the language of paragraphs 2 and 3 of C. A. R. IV.

(2) *The Government has cited no authority, either before or after the promulgation of C. A. R. denying the Circuit Court of Appeals the power, on time limitation grounds or on any other grounds, to remit the transcript in a criminal*

case or any other law action to the district court for compliance with the requirement as to narration and condensation, or itself to permit that narration and condensation to be done in the Circuit Court of Appeals.

Before considering the Government's authorities on this branch of the case, it seems proper to reiterate what is, and what is not, wrong with the bill of exceptions in this case. As to what is *not* wrong: (a) it has, in fact, been signed and settled by the trial court and filed with the clerk of that court (R. 25), and the Circuit Court of Appeals has ruled that such settlement and filing were timely (R. 30); (b) there is no question as to the accuracy of this bill as a statement of the proceedings at the trial; (c) it cannot successfully be contended that it contains irrelevant matter, since it contains only the evidence and rulings (the colloquy having been stricken before settlement), and the substance of *all* of this is essential in view of the assignment of error as to insufficiency of the evidence (cases cited in petn. p. 2, note 3); and (d) on the other hand it is not contended that the bill is insufficient in the sense that it omits relevant or necessary matter.

The *sole* objection, therefore, is to the *form* of this bill. While, in view of what was said in the *Barber Asphalt* case, we must concede that this requirement of form is an important and substantial requirement, disobedience with which is not excused by the technical error statute, it is important, we submit, that the question of whether it is a *nullity*, or whether, and if so what, remedies for the situation are now available in the hands of the Circuit Court of Appeals, should be approached with an understanding at the outset that the only thing the matter with this bill of exceptions has to do with its *form*.

The petitioner has authorities which establish that, in such a situation, the Circuit Court of Appeals has two distinct

courses which it can pursue, either of which will result in saving the petitioner his appeal, and at the same time in securing compliance with the condensation and narration requirement. As established in petitioner's main brief, the *Barber Asphalt* case, although in equity, is based upon principles equally applicable to a law action, and authorizes the Circuit Court of Appeals (notwithstanding the time for *settlement of a bill of exceptions* has gone by) to retain jurisdiction of the appeal and yet remit the transcript to the District Court to put the evidence in narrated and condensed form. And the alternative remedy insisted upon in petitioner's main brief, was recognized even before the promulgation of C. A. R. In *Caldwell* v. *U. S.*, 36 F. (2) 738, 740 (C. C. A. 10th—1929) the Circuit Court of Appeals, while holding that a *verbatim* transcript of the proceedings at the trial was not a bill of exceptions in compliance with Supreme Court Rule 8 and the identical provisions of Circuit Court of Appeals (10th) Rule 10, nevertheless said it had the power to permit the appellant to remedy the situation by preparing a narration and condensation in the Circuit Court of Appeals, which, when agreed to by appellee, could be printed and filed as the narrative statement in the Circuit Court of Appeals.[1] It is true that in the case last cited the Circuit Court of Appeals felt the *Barber Asphalt* doctrine to be inapplicable at law, but it found a substitute power in itself, even in the absence of the broad discretionary authority now expressly given to the Circuit Courts of Appeals

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[1] The Court there said: "On the oral argument of the case at bar this situation developed, and counsel asked and was given leave to print and file a narrative statement of the evidence in accordance with the rule, which in a law action can only be done by stipulation of the parties. In this respect it is unlike *Barber Asphalt Co.* v. *Standard Co.*, *supra*, which was an equity case. Counsel for the appellant summarized the 352 pages of evidence in 8 printed pages. He failed, however, to secure the approval of the district attorney to the condensation. Our review of some of the errors assigned will therefore be circumscribed."

in criminal cases by C. A. R. IV and C. A. R. IX. It is also true that the court thought it necessary on this procedure to secure the concurrence of the United States Attorney to the narration. But as a practical matter the Court is aware that that is always true of the preparation of narrative and condensed statements. Courts are loath to accept them until the parties themselves have straightened out their differences and agreed upon the form. It was precisely the procedure adverted to with approval in the *Caldwell* case that the Circuit Court of Appeals suggested at first that petitioner follow; and thereafter, when he attempted to follow it, the Circuit Court of Appeals felt compelled to deny its own power to allow this to be done. As pointed out in petitioner's main brief, we are unable to see how such denial can stand in the face of the broad discretionary power now expressly given to the Circuit Courts of Appeals in respect of this very matter by C. A. R. IV and C. A. R. IX.

In decided contrast to the situation of the petitioner (who has the support of these authorities, as well as of the express terms of the C. A. R.) is the position of the Government. Its brief cites no case, either before the C. A. R. or afterwards, which denies to the Circuit Court of Appeals either of the powers which we insist that it has, *i. e.*, the power of remission, and the power to order a reduction of the bill to narrative and condensed form in that court.

The holdings of the cases cited by the Government go no farther than this: that a bill of exceptions in which the evidence is not narrated and condensed is not in proper form—a proposition which petitioner does not deny. The Government cites (brf. p. 30) six decisions of the Tenth Circuit Court of Appeals, all decided at practically the same time and reported in the same volume of the Federal Reporter. These are all short decisions refusing to review errors arising on the trial on the ground that "a literal transcript of all the proceedings at the trial" is not a bill

of exceptions. If the Government's purpose in citing these cases is to show that a bill of exceptions consisting of such a transcript is a nullity, then it fails. The opinions in these cases do not even show whether the transcripts were settled as bills; and it does not appear that any question was there raised as to the power to reduce the record to narrated form in the Circuit Court of Appeals, or to remit it for reduction. Moreover, each of these decisions cites and relies upon the *Caldwell* case, decided by the same Circuit Court of Appeals a short time before, where, as previously noted, it was said that the court did have the power to permit reduction and narration in the Circuit Court of Appeals. It is thus apparent that the Government position (which is, in ultimate, that what was here settled as a bill of exceptions is a nullity), can take no comfort from the Tenth Circuit decisions.

Nor do the decisions of the Second Circuit Court of Appeals—which are the only other decisions cited by the Government as pertinent on this point (brf. 35-36)—afford support for the Government's view. Examination of the five Second Circuit decisions cited by the Government establishes that, despite broad language in some of them to the effect that a stenographer's transcript is not a bill of exceptions, yet in most of the cases the court went ahead anyway to consider and decide the assignments of error going to the evidence, doing so "as matter of grace". But, if the bill of exceptions in such form was a nullity, the court would have had no evidence before it; it would have had to decline jurisdiction of the assignments going to the evidence, and would have had no power to consider them, whether as matter of grace or not. Moreover, none of these decisions indicate that any question was there raised as to the power of the court to correct the situation by remitting the transcript under a *Barber Asphalt* type of

order, or of the power to permit reduction in the Circuit Court of Appeals as suggested in the *Caldwell* case. Again, they were all decided prior to the promulgation of the Criminal Appeals Rules, and, of course, no point was made in those cases of the wide discretionary power as to the makeup of the record now given to the Circuit Court of Appeals by those rules.

(3) *The Government's argument as to the untimeliness of the settlement of the bill has no support in applicable authority and is unsound.*

The Government places primary stress upon its argument that the bill here was settled out of time because this was done on Monday, November 2, while the extension order ran only until November 1. In its brief opposing certiorari the primary ground of this argument was that the provision of the C. A. R. excluding Sundays in computing time is inapplicable where the order of the trial judge in a particular case shows that he picked a day certain to toll the time, thereby intending to make that the last day and do away with the necessity for computation. This is based on the intention of the judge in making his order; and in the reply brief on the petition we pointed out that in *this* case the trial judge has otherwise construed his own order when, on Friday, Oct. 30, 1936, he suggested certain deletions in the bill and, although informed his extension expired on Sunday, directed the parties to come back for settlement—not on Sunday, Nov. 1—but on Monday, Nov. 2. This fact appearing in this case also serves to distinguish the case on which the Government principally relies, *i. e.*, *Cooney* v. *Burt*, 123 Mass. 579. In that case, decided in 1878, the court remarked that the question depended" upon the construction of the special order made by the judge in this case". On its face that order ran to a day certain, and there were no facts to show that, before that day was

reached, the trial judge has otherwise construed his own order, as had the trial judge here.

The Government's next argument on the timeliness point is that, as matter of law, no "computation" is necessary when a day certain is specified; hence the provisions of C. A. R. XIII do not apply. This is hardly distinguishable from the previous argument, and is really answered by what has been said. In addition, as pointed out in our reply brief on the petition (pp. 3-4), it is entirely too narrow a construction of C. A. R. XIII—a construction under which this Court would have failed to provide for the commonest type of situation which arises, *i. e.*, that where the last day falls on Sunday.

Finally, on this timeliness point, the Government argues that the "special circumstance" doctrine of the *Taylor* case (our reply brief pp. 4-6) is inapplicable here because in the *Taylor* case the circumstances which resulted in the presentment of the bill on the following Monday when the time had expired on the preceding Sunday were clearly attributable to delays caused by the United States Attorney. It is true that on this record we cannot say that precisely the same situation here exists—although we do think the record supports an assertion that the United States Attorney's office was not cooperative in the settlement of this bill. But in this case we have an even stronger "special circumstance" than in the *Taylor* case. Here the trial judge, presented with the bill for settlement on the Friday, suggested deletions and that the parties come back on the Monday—although he was expressly informed that his extension order, in terms, ran only till the Sunday (R. 24).

(4) *The Government's argument as to absence of abuse of discretion is unconvincing.*

The only argument under this heading that appears to require attention is the Government's assertion the peti-

tioner's counsel's statement (affidavit attached to petition p. 39) that, *so far as petition was concerned,* narration and condensation could have been completed in the five days remaining between October 27 and November 1, establishes the fact that he has slept on his rights and therefore the court below was correct in refusing him relief.

This argument proceeds as though counsel has admitted that the petitioner could actually get a narrated and condensed bill *settled* within the five days remaining. He said no such thing—but only that petitioner could do his part of the work within that time. But it is a patent fact, well known to any appellate tribunal or practising lawyer, that no trial judge is going to settle an *appellant's version* of a condensed bill without giving the Government counsel full opportunity to object to it, study it, and submit their own version. Particularly is this true in a hard fought case like this one where much of the evidence on vital issues was circumstantial. Petitioner had had experience with Government counsel in this case. He had submitted them a portion of his narrated version more than a month before the settlement date, and though they had promised to make their corrections and revisions, he had had no word from them at all about the matter in the interim (R. 21). This should make it clear that when his counsel stated to the Circuit Court of Appeals that petitioner could complete his part of the work of narration within the time remaining, he meant just that—not that he could get a settled narrated bill within that time.

The Court is here dealing with a case where one who is to all practicable purposes a layman, and who found himself without sufficient funds to retain his experienced trial counsel for the appeal, has been held by the court below to have fallen inescapably into the springes of Federal criminal appellate procedure. We had thought the clear and simple Criminal Appeals Rules had no springes in

them, and yet they have been here held to require the stringent penalty of dismissal of the appeal because the accurate, timely bill of exceptions, consisting solely of relevant matter, is not in narrative and condensed form. The requirement as to narration and condensation is not one with which an appellant, however able and diligent, can comply without the active cooperation of the courts and of opposing counsel. The courts below have shown every disposition to aid petitioner—relief being ultimately denied him because of a mistaken view by the Circuit Court of Appeals of its own powers. As to counsel for the Government in the court below, the least that can be said is that this record evinces no willingness on their part to cooperate in the perfecting and hearing of the appeal.

Without active cooperation from opposing counsel, an appellant under existing Federal appellate procedure is at extreme disadvantage in getting a bill of exceptions narrated, condensed, and settled. While it is perhaps understandable why many judges simply will not, and in many cases cannot, undertake to settle a narrative form bill of exceptions upon which counsel have not agreed, nevertheless the situation is one which gives the appellee the whip hand. In this situation, any finding that appellant had been guilty of *laches* (and none is made here) would take a strong showing, and would also entail inquiry into the conduct of opposing counsel.

These considerations, among others, no doubt supply the reason why the narration requirement has been disapproved in at least 42 States, as reported to this Court recently by its Advisory Committee on Civil Rules (pp. 135, *et seq.*). It is also of interest to note that that Committee has recommended to this Court that the narration requirement be abolished in the Federal appellate practice as well, since its advantages "are more than outweighed by the delays in preparing the narrative form, and the heavy bur-

den and expense on litigants and lawyers in preparing and settling and agreeing upon narrative statements." (Report, p. XV.)

We admit, of course, that the narrative requirement is the present law, and that no issue is here involved as to its abolition. But what we have just said, and what we have just quoted, establish, we submit, that an appellant in the position of this petitioner cannot be held to have voluntarily thrown away his right of appeal by failing to accomplish something the doing of which was within the control of the other side of the case. We do not believe that the opinion of the court below can properly be read as holding that he has done so. The ruling below is based on want of power.

Respectfully submitted,

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